U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: December 7, 2000

CASE NO: 2000-INA-78

In the Matter of

ELLSTREET CORPORATION D/B/A AI
Employer

on behalf of

PING ZHU
Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Ellstreet Corporation d/b/a Ai's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient

workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On August 10, 1998, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Washington, D.C. Department of Employment Services ("DOES") on behalf of the Alien, Ping Zhu. (AF 29-30). The job opportunity was listed as "Interior Designer". The job duties were described as follows:

> Design and furnishing of large scale corporate interiors projects, development of architectural detailing, space planning and construction documentation.

(AF 29). The stated job requirements for the position, as set forth on the application, included a M.S. degree in Interior Design and 1 year of experience in the job offered or in the related occupation of Architectural Design. (Id.). Other special requirements were listed as: "Must be proficient with AutoCAD 14." (Id.).

On September 7, 1996, Employer submitted its Results of Recruitment Report stating that neither of the two U.S. applicants were qualified for the job offered. (AF 17-18). Employer asserted that the applicants did not meet the requirements of the job offered due to two job-related reasons. First, Employer explained that both of the applicants do not possess an M.S. degree in Interior Design. Second, Employer found that neither of the applicants possessed experience in large-scale corporate interiors projects. (AF 18). Employer explained that their work experiences are also "insufficient due to the nature of design work that we have, which takes our clients from site planning to base building architecture, and from base building architecture to interior design. This requires an interior designer with an architectural objective." (Id.). Employer found that neither applicant has any architectural design experience to compensate for their insufficient experience in the job offered. Employer concluded that because neither applicant possessed the "skills and expertise provided by a Masters Degree in Interior Design, nor do they possess experience in large-scale corporate interior projects, Ms. Zhu is the only available candidate qualified to fill the Interior Designer position." (Id.).

The CO issued a Notice of Findings ("NOF") on September 22, 1999, proposing to deny the certification based on the finding that U.S. applicants were rejected for other than lawful, job-related reasons. (AF 13-14). First,

the CO found that the Department of Labor standard for proficiency in the occupation of Interior Designer is four to ten years of combined training, education and/or experience. (AF 14). The CO explained that:

> Applicants possessing education, training, and/or experience in the occupation of Interior Design, or in a lesser occupation, in an amount commensurate with the [Dictionary of Occupational Titles ("DOT")] standard are considered qualified for this job opportunity, despite the fact that they may not possess a M.S. in Interior Design.

(Id.). In addition, the CO noted that the 1998-99 Occupational Outlook Handbook indicates that a B.S. is the normal educational requirement for this occupation in the U.S. (Id.). The CO found that applicants Mitchell and Graminski, based on the information contained in their resumes, were qualified for the position, despite the fact that they do not possess a graduate degree in Interior Design. Second, the CO found that the Employer rejected U.S. applicants for lacking qualifications that were not stated as job requirements on the Form ETA 750, Part A, or in the advertisements. The CO found that the requirements listed for the position did not include "actual experience with large scale corporate interior projects." (Id.). In addition, the CO found that both applicants possess an undergraduate degree in Interior Design and several years of experience in the occupation. Specifically, the CO noted that applicant Mitchell's resume clearly indicated that he had several years of experience designing large-scale projects with the Federal Government. The Employer was instructed that it had the burden of proof to show that U.S. workers were not able, willing, qualified or available for this job opportunity. (Id.).

The Employer submitted its rebuttal on October 18, 1999. (AF 6-12). The Rebuttal consisted of a letter from Employer attempting to justify the job requirements and explaining the lawful, job-related reasons for the rejection of U.S. workers, an internal memo summarizing the telephonic interviews with the two U.S. applicants, and, a brochure describing Employer's business with photographs and descriptions of different projects. Employer explained that it is one of the largest and most successful design firms in the Washington D.C. metro area and that it "carefully selects the new employees to ensure that we have the right mix of skills with in the company to remain competitive." (AF 6). Employer asserted that one of the key duties of the position offered is to design and furnish large-scale corporate interiors projects. Employer argued that this duty was stated on the Form ETA 750, Part A and in the job advertisement in addition to the indication that one year of experience was preferable. Employer explained that when designing and furnishing large scale corporate interiors projects, the designer is required to "design space forms, color schemes, interior architectural details, and prepare high quality presentation drawings and develop 3D CAD model studies of the space. ... So the focus is not just furniture and finish selection, but includes strategic planning, programming and problem solving." Employer also argued that:

> Many of the advanced knowledge and skills required in those projects can only be obtained from a M.S. program in Interior Design. It includes learning and research on "behavior science and environmental design", "psychology and environmental design", "sustainable building", "green products in interior environment", "ergonomics at workplace", "universal design and ADA compliance", "statistics of behavioral science", "alternative officing", "advanced interior design research methodology", "advanced interior design research methodology", "advanced interior design

> studio", and "3D CAD modeling." Additionally, in order to complete the job duties, the designer must be proficient in AutoCAD 14....

(AF 7). Employer argued that neither of the applicants possess a Master's degree in Interior Design nor do they possess experience in large-scale interiors projects. Employer stated that it did not have the time or resources to train them how to design and furnish large-scale corporate interiors projects, or educate them with the advanced knowledge and skills required by the job offered. (Id.). In addition, Employer interviewed the applicants on the telephone after receiving the NOF. The internal memorandum submitted with the Rebuttal provided the following explanations for the rejection of the two U.S. applicants:

> The first applicant, Marla Graminiski, has 16 years of experience doing residential renovations and small leasing offices. She is certainly not suited for the position as she has never done any large scale corporate interiors projects. Her role has been more of a Senior Project Designer not a staff Interior designer - again on smaller projects. She is not very familiar with strategic planning and programming software and has not done any three dimensional CAD work. Also, she would like a salary that is $15 - 20,000 above the current salary level for the position. She agreed that we what have available i s not what she is interested in pursuing.

The second applicant, Anthony Mitchell, has 12 years of experience as a CAD operator/manager. As we already have a CAD Manager, we do not need his services. Mr. Mitchell's resume also reveals some major gaps in time between jobs that he was not able to readily explain. I asked several questions regarding his education at Columbia College in Chicago that left him confused and left me wondering. He also admitted that he had not been working as a designer per se but a Cad operator who could pull together a Construction Document set. This is not what we need. In addition, his salary requirement exceeds what the position pays and what, in my opinion, his skills are worth.

(AF 8).

The CO issued a Final Determination ("FD") on October 27, 1999, denying certification. (AF 3-5). The CO reviewed the Employer's rebuttal and concluded that it failed to satisfactorily rebut the findings in the NOF. First, the CO found that the rejection of the U.S. workers in favor of the Alien cannot be regarded as arising from lawful job-related reasons as Employer did not establish that the duties of the position could not be performed without a graduate degree. (AF 4). Second, the CO found that U.S. applicants Mitchell and Graminski were rejected for lacking experience in large scale projects, a qualification that was not previously identified by Employer as a requirement for the position. (Id.). The CO noted that the Employer interviewed the U.S. applicants after the NOF was issued and provided the following new reasons for rejecting these applicants: "Ms. Graminski does not have the correct background and demanded a higher salary than offered; Mr. Mitchell's experience was largely as a CAD operator/manager. He had gaps in his employment history and his answers to your questions regarding his education were confused." (AF 4-5). The CO did not accept this response, finding that Employer presented no evidence or independent documentation that in any way supports its statements that the skills Employer is seeking can only be obtained from an M.S. degree program. (AF 5). The CO explained that: "Your statements regarding the status of

your firm in the community, the increase in the volume of your business and the shortage of interior designers (all stated as reasons for seeking a designer with advanced knowledge and skills) are also unsupported by independent evidence." In addition, the CO found that Employer's post-NOF interviews with the applicants do not establish that the applicants were lawfully rejected. Specifically, the CO noted:

> With regard to Ms. Graminski, you stated that she has been a Senior Project Designer and not a staff Interior Designer, implying that your interviewer found her to be overqualified. You then stated that she lacked familiarity with "strategic planning, programming software and 3 dimensional CAD", skills nowhere mentioned as requirements for the job. Given these inconsistencies, we do not find credible your statement that she wanted a much higher salary. With regard to Mr. Mitchell, your conclusion that he is only qualified to be a CAD operator or manager is not supported by the evidence. While his resume may have some gaps, Mr. Mitchell clearly has well over one year of experience as an interior/architectural designer, and exceeds your experience requirement for the position.

(Id.). The CO concluded that Employer failed to provide lawful, job-related reasons for the rejection of otherwise qualified U.S. workers.

The Employer filed a Request for Review on November 16, 1999. (AF 1-2). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

Discussion

Section 656.21(b)(6) states that an employer is required to document that U.S. applicants were rejected solely for job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Café*, 1990-INA-26 (Jan. 24, 1991). Section 656.24(b)(2)(ii) provides that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers. The principal issue presented here is whether applicants Mitchell and Graminski were rejected for a lawful job-related reason.

Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. *Daniel Costiuc*, 1994-INA-541 (Feb. 23, 1996); *H.C. Lamarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, an employer has not proven that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the work as required under Section 656.1.

In the instant case, the CO found that applicants possessing education, training, and/or experience in the occupation of Interior Designer, or in a lesser occupation, in an amount commensurate with the DOT standard are considered qualified for this job opportunity, despite the fact that they may not possess a Master's degree in Interior Design. The CO noted that the 1998-99 Occupational Outlook Handbook indicates that a B.S. is the normal educational requirement for this occupation in the U.S. The CO also pointed out that the U.S. applicants, based on their resumes, are qualified for the position despite the fact that they do not possess a graduate degree in Interior Design. (AF 14). The CO informed the Employer that it had not established that the duties of the position could not be performed without a graduate degree. The Employer was instructed that it had the burden of proof to show that the U.S. workers were not able, willing, qualified or available for this job opportunity. The Employer responded in its rebuttal that many of the advanced knowledge and skills required in those projects can only be obtained from a M.S. program in Interior Design, and both the U.S. applicants lacked this graduate degree.[1] Unless the form of evidence is specified by the regulations or by the NOF, "written assertions which are reasonably specific and indicate their sources or basis shall be considered documentation." *Gencorp*, 1987-INA-659 (Jan. 13, 1988). In this case, however, the presentation of bare assertions of fact without supporting evidence in the Employer's rebuttal was insufficient to carry its burden of proof. *Best Sports Car Service*, 1999-INA-159 (October 5, 1999). The Employer's rejection of the U.S. applicants based on their lack of a Master's degree in Interior Design was, therefore, unlawful.

While the CO raised the issue in the context of the unlawful rejection of U.S. applicants, he also could have considered the issue as to whether a Master's Degree in Interior Design was unduly restrictive. The CO advised the Employer in the NOF that a B.S. is the "normal educational requirement for this occupation in the U.S." (AF 14). The CO also notified the Employer that the Department of Labor standard for proficiency in the occupation of Interior Designer is "four to ten years of combined training, education and/or experience."[2] These findings imply that the CO found the Employer's requirement to be unduly restrictive, but this finding was not expressly stated. However, since we affirm the CO on the basis that the U.S. applicants met the restrictive requirement through a combination of education, training, experience, it is not necessary to discuss whether the CO erred by not giving the Employer the opportunity to rebut the issue of whether or not the Master's Degree requirement was unduly restrictive. *Cf. Ronald J. O'Mara*, 96-INA-113 (Dec. 11, 1997) (*en banc*) (holding that where an employer is unsuccessful in its attempt to establish business necessity for a job requirement, the employer is not afforded an opportunity to readvertise the position if the NOF finds that the Employer rejected U.S. applicants who met the restrictive requirements).

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[1]In its rebuttal to the NOF, the Employer also set forth new reasons for rejecting Applicants Mitchell and Graminski. (AF 8). The Board has held that a CO is not required to investigate the legitimacy of a totally independent reason for rejection offered by the employer for the first time in response to the NOF. *Foothill International, Inc.*, 1987-INA-637 (Jan. 20, 1988); *see also American Café, supra*.

[2]According to the Dictionary of Occupational Titles, the SVP for the occupation of Interior Designer is seven, which is defined as two years up to and including four years. DICTIONARY OF OCCUPATIONAL TITLES at 91.

The CO also denied certification on the grounds that Employer rejected the U.S. applicants for lacking qualifications that were not stated as job requirements on the Form ETA 750, Part A, or in the advertisements at the time of the application. (AF 14). The U.S. applicants were rejected in part because they lacked experience in large-scale corporate interiors projects. The CO notified Employer that this qualification was not previously identified as a requirement for the position and that applicant Mitchell's resume clearly indicated that he had several years of experience designing large-scale projects with the Federal government. The Employer responded that "one of the key duties of the position offered is to design and furnish large-scale corporate interiors projects. We stated this key duty on Form ETA 750, Part A and in the job advertisement." (AF 6). The requirement in question was listed on the Form ETA 750, Part A, # 13. (AF 29). Nowhere, however, does Employer assert that experience in large-scale corporate interiors projects was a minimum requirement and so listed in Item # 14 or 15 of the form. Indeed, the only experience required was a Master's degree in Interior Design and one year of experience in the job offered or in the related occupation of Architectural Design. The only special requirement listed was: "Must be proficient with AutoCAD 14." (Id.). The first time Employer referred to this experience as a requirement was in its Results of Recruitment Report. Employer cannot add additional minimum requirements to a position after advertising and receiving qualified responses. *See Chromatochem Inc.*, 1988-INA-8 (Jan. 12, 1989) (*en banc*).

The Employer has failed to sustain its burden of proof that it rejected U.S. applicants for lawful job-related reasons. The Evidence of record supports the CO's denial of labor certification under the Act and regulations.

ORDER

The Certifying Officer's denial of labor certification is **AFFIRMED**.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California